

FILED

August 2 2006

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

SEVENTEENTH JUDICIAL DISTRICT COURT

Phillips County Courthouse
P.O. Box 470
Malta, MT 59538
(406) 654-1062 Office
(406) 654-2363 Fax

John C. McKeon
District Judge

PR 06-0120

Kathy King
Court Administrator

Phillips County - Malta
Blaine County - Chinook
Valley County - Glasgow

Kelley A. Barstad
Court Reporter

July 20, 2006

Chief Justice Karla M. Gray
Montana Supreme Court
215 N. Sanders
PO Box 203003
Helena, MT 59620-3001

Re: Treasure Co. Cause DC-92-01
State v. Van Haele

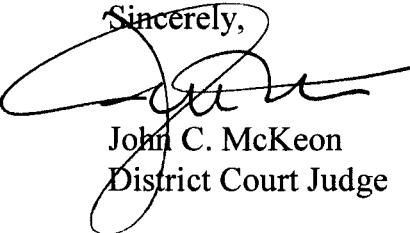
Dear Chief Justice:

In accordance with § 3-1-805, MCA, I am providing copy of Motion for Disqualification for Cause and Affidavit filed by above-named defendant on July 14, 2006.

For your information, this matter was appealed on March 19, 2002 following Order to Revoke Suspension of Sentence filed March 12, 2002. Remittitur was filed July 5, 2005 following an Order affirming the decision of the District Court. I am unaware of any pending matter in District Court.

Given the provisions of § 3-1-805, MCA, I have not made any determination regarding the propriety of the foregoing motion and affidavit.

Sincerely,


John C. McKeon
District Court Judge

cc: Treasure Co. Clerk of Court

Tom Van Haele, 18398, pro se
PO Box 916
Shelby, MT 59474

FILED

AUG 02 2006

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

COPY

FILED THIS 14th DAY
OF JULY 2006
AT 11:35 O'CLOCK A. M.
RUTH L. BAKER

Clerk of The District Court

By
Passenger Olson
DEPUTY CLERK

In The Montana Sixteenth Judicial District Court

Thomas Van Haele,
Defendant,

v.
Montana Sixteenth judicial District
Court,
Respondent.

Cause No. DC 92-01

Affidavit of Thomas Van Haele In
Support of Motion For
Disqualification For Cause of
Judge John C. McKeon

Thomas Van Haele being of sound mind and body make the
following statements under oath of perjury pursuant to Title 21. S.C.A.
28, Section 1746 and swear that they are true and correct.

1. That I could never have a fair and just trial proceedings
concerning my forthcoming post conviction petition with Judge John C.
McKeon as the presiding judge due to the following facts.

2. That Judge McKeon failed to protect my due process rights by
delaying his decision of the November 20, 2001 revocation hearing until
March 12, 2002 which is a period of 113 days.

3. That Federal law mandates "A final determination and notice
of action will be given to the [probationer] no later than 86 days after arrest."

(1) affidavit

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4. That judge McKeon accepted jurisdiction in this cause on September 25, 2001 and did not make a final decision until March 12, 2002, which violated the mandated 86 day requirement of due process of 86 days after arrest by taking 169 delayed days which is 83 days past the mandated 86 days of Federal Law requirements from arrest to a decision.

5. That judge McKeon denied me my due process rights to be present at sentencing on March 12, 2002 when he sentenced me to 15 years in prison which denied me the right to speak on my behalf.

6. That judge McKeon violated my statutory rights and my constitutional rights to be present at my sentencing on March 12, 2002.

7. That judge McKeon violated my due process rights by punishing me for appealing the September 27, 2000 revocation decision which resulted in a sentence of 15 years with 8 suspended but judge McKeon sentenced me to 15 years with no time suspended.

8. That if I had been present at sentencing I would have been able to bring this due process violation of punishing me for appealing to judge McKeon's attention.

9. That judge McKeon allowed and condoned fraud of false and perjured testimony of Mr. Chris Quigley, Sex Offender Counselor of Montana State Prison at the November 20, 2001 revocation hearing concerning a false and altered Sexual Offender Risk Assessment where Mr. Quigley altered the assessment from a Tier II evaluation to a Tier III evaluation to prevent me from being released to a suspended sentence.

10. That judge McKeon used the altered Sexual Offender Risk Assessment of a tier III evaluation to violate my suspended sentence after being duly notified the document was false and fraudulent.

(2) affidavit

11. That the Sexual Offender Risk Assessment used at the November 20, 2001 revocation hearing was not prepared using the clinical history of Thomas Van Haele and must have been prepared using another person's clinical history.

12. That using the Sexual Offender Risk Assessment tool with the correct information I would score a Tier I Risk Level.

13. That judge McKeon could not have violated my probation if I had been evaluated correctly as a Tier I Risk Level because Marla North would have accepted me into her sexual offender program as a Tier I Risk Level.

14. That judge McKeon refused to have Marla North re-evaluate me to see if I could be placed in her programs as she requested.

15. That I never met with any of the staff members who prepared the Sexual Offender Risk Assessment at Montana State Prison which denied my due process rights of procedural due process.

16. That judge McKeon failed to enter a decision on my pro se motion to withdraw guilty plea filed on March 29, 2001 of which such a delay has violated my due process rights. He has never addressed the merits of that motion to this day - a period of over 5 years.

17. That I was entitled to a decision on my pro se motion to withdraw the guilty pleas whether or not it was filed procedurally correct or not so that I could file an appeal to the Montana Supreme Court.

18. That judge McKeon failed to issue a new arrest warrant after the September 27, 2000 probation violation hearing was declared void which violated my due process rights because Montana case law mandates that the state may "proceed anew."

(3) Affidavit

19. That judge McKeon refused to lower my bond from the \$100,000.00 even after I had served my 15 year prison sentence and after being informed that my bond was only \$30,000.00 after pleading guilty in 1982 and before my sentencing hearing and after being informed that I was indigent.

20. That judge McKeon refused to release Defendant "within 48 hours" after the September 27, 2000 revocation was found to be void-ab initio as mandated by Montana Supreme Court decisions and orders. See Mitchell v State, Mt. Sup. Ct. Order No. 01-760 (11-27-01) at 1, and also Drummond v State, Mt. Sup. Ct. Order No. 01-678 (10-30-01) at 1 and 2.

21. That Defendant presented the above case law at his November 20, 2001 revocation hearing and judge McKeon refused to follow these laws.

22. That Defendant presented uncontested testimony of his actual innocence at the November 20, 2001 revocation hearing through the testimony of the purported victims' attorney.

23. That judge McKeon failed to consider the testimony of Defendants actual innocence in the fact finding process and in his orders after it was properly presented in his court and made part of the court record.

24. That judge McKeon never mentioned any of my evidence of my actual innocence in any of his opinions.

25. That judge McKeon stated in the Order to Revoke Suspension of Sentence that he was revoking the suspended sentence because of the Tier III evaluation.

26. That Defendant produced evidence at the revocation hearing proving the sexual offender risk assessment was prepared using false information, but judge McKeon failed to state such facts in his order of revocation.

27. That the risk assessment gave Defendants 2 points for being on probation at the time of the alleged criminal acts.

(4) Affidavit

28. That judge McKeon was advised at the revocation hearing that Defendant was not on probation at the time of the alleged criminal acts.

29. That judge McKeon was advised at the revocation hearing that when the 2 points for being on probation are subtracted from the risk assessment score, Defendant would score a tier II risk level.

30. That Defendant presented discovery responses at the revocation hearing that were responses made by the purported victims that confirmed that there was no sexual intercourse perpetrated by Defendant against them.

31. That the purported victims' attorney John Yoder testified at the revocation hearing that the above discovery response confirmed that there was no sexual intercourse perpetrated by Defendant against the purported victims and that this testimony is located in the hearing transcript, pp. 297-298.

32. That the above discovery responses were verified by the purported victims' guardian ad litem and both of them denied ever having been subjected to intercourse, either anally, orally or vaginally at the hands of Defendant and that Yoder's testimony verifying this is in the transcript, pp. 299-304.

33. That the sworn discovery responses swear that: "Plaintiff [victim] never made allegations of 'sexual intercourse.'" (Response No. 6).

34. That Defendant was charged with several counts of sexual intercourse and convicted of one count of sexual intercourse.

35. That judge McKeon held in his Order to Revoke Suspension of Suspended Sentence that Defendant "voluntarily pled guilty," see Conclusions of Law, No. 6.

36. That Defendant attempted to raise these issues as a pro se litigant in his direct appeal, Cause No. 02-400 in the Montana Supreme Court, but the Court refused to accept them because Defendant had an attorney of record.

(5) Affidavit

37. Defendants bond pre trial and after conviction until sentencing was \$30,000.00.

38. Judge McKeon refused to lower Defendants bond from the \$100,000.00 bond set for the probation revocation proceedings.

39. That judge Mc Keon held an evidentiary hearing and found that Defendant was indigent.

Certificate of Good Faith

This is to certify that this affidavit has been made in good faith. It is not based solely on rulings in the case but on omissions of Judge Mc Keon. These issues should have been addressed in the appeal but my counsel refused to raise them. I tried to raise them in pro se filings in the appeal but they were not accepted.

Dated July 10, 2006

Thomas Van Haale

Pursuant to U.S.C.A. Title 28, Section 1746, I swear that the above facts in the affidavit and the Certificate of Good Faith are true and correct.

Dated, July 10, 2006

Thomas Van Haale
Thomas Van Haale, 18398
PO Box 916
Shelby, MT 59474

Certificate of Service

I hereby certify that I served a true and correct copy of the foregoing document by placing same in the U.S. Mail service, or by hand delivering to said persons addressed to:

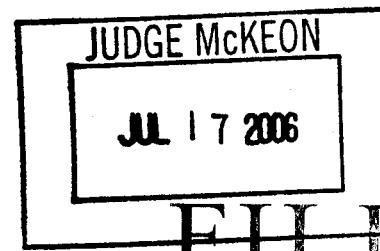
Treasure County Attorneys Office
Treasure County Courthouse
Hysham, MT 59038

Dated, July 14 2006

Clerk of Court 16th Judicial District Court
Treasure County Courthouse
Hysham, MT 59038

Karen V. Van Haale
(6) Affidavit

Tom Van Haele, pro se
PO Box 916
Shelby, MT 59474



FILED THIS 14th DAY
OF JULY 2006
AT 11:35 O'CLOCK A. M.
RUTH L. BAKER
Clerk of The District Court

~~FILED~~

Gasmann Olson

AUG 02 2006 CLERK

~~COPY~~

Ed Smith

CLERK OF THE SUPREME COURT
STATE OF MONTANA

In The Montana Sixteenth Judicial District Court

Thomas Van Haele,
Defendant,

v.

Montana Sixteenth Judicial District
Court,

Respondent.

Cause No. DC 92-01

Motion For Disqualification
For Cause of Judge John C. McKeon
And Brief In Support

Thomas Van Haele (Defendant) hereby moves for disqualification
for cause of judge John C. McKeon pursuant to Section 3-1-805 MCA.

Judge John C. McKeon has shown extreme personal bias and
prejudice against the Defendant throughout the previous suspended
sentence revocation proceedings in the above entitled cause.

Defendant swears under oath of perjury that he could never
have a fair trial with Judge John C. McKeon presiding as jurist in
the forthcoming post-conviction proceedings as set forth in the
attached Affidavit of Thomas Van Haele, at No. 1. (Affidavit).

Mont. Code Ann. Section 3-1-805 states in relevant part:

"1. Whenever a party to any proceeding in any court shall file an affidavit

(1)

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appeal, therefore Defendant must not now be forced to have the biased and prejudiced Judge McKeon hear and decide his own constitutional failures or violations of Defendants fundamental constitutional rights.

See Matteson v. MT. Power Co., 2001 ML 3853, p. 2 (Mont. 2001) (Fundamental due process guarantees every litigant a competent and unbiased judge).

See also, Liljeberg v. Health Services Corp., 486 U.S. 847 (1988) (Right to a fair trial is basic requirement of due process and includes right of unbiased judge).

The Liljeberg Court restated the age old mandate that: "We must continuously bear in mind that 'to perform its high function in the best way justice must satisfy the appearance of justice.' Citing In re Murchison, 394 U.S. 133 (1955); Liljeberg, 486 U.S. at 864.

The following facts that are sworn under the oath of perjury in the attached affidavit of Thomas Van Heege (Affidavit) show that the omissions and failures of Judge Mc Keon are unprofessional, unethical, and unacceptable and call for his disqualification for cause.

① Failure to follow due process time requirements as mandated by Morrissey v. Brewer, 408 U.S. 471 (1972) of reasonably prompt decisions.

Judge Mc Keon accepted jurisdiction in this cause on September 25, 2001, held a revocation hearing on November 20, 2001, and failed to render a decision until March 12, 2002. See Affidavit, Nos. 2-4. Morrissey set forth procedures to ensure that parole revocation proceedings will occur in a timely fashion and will comport with due process of law. On November 21, 2001 (the same date as Defendants revocation hearing) a United States District Court in the District of Columbia accepted a plan submitted by the United States Parole Commission that: "A final determination and notice of action will be given to the parolee no later than 86 days after arrest." Long v. Haines, 173 F. Supp. 2d 35, at 36,

(D. O.C. 2001). The court "Further Ordered that implementation of the Plan shall commence immediately," Id. at 37. See also United States v. Shampang, 987 F.2d 1439, 1443 (9th Cir. 1993) "An unreasonable delay between the violation and the decision to revoke probation may prejudice the probationer." In the instant case judge McKeon sat on his doff for 169 days before reaching a decision, which violated the due process requirements set forth in Long v. Gaines by 83 days. From the date of the revocation hearing on November 20, 2001 until judge McKeon's decision on March 12, 2002 was a delay of 113 days that alone was a due process violation of inordinate delay of the required 86 days from arrest to a decision.

(2) Denied due process right to be present at sentencing.

Judge McKeon sentenced Defendant to 15 years in absentia without a waiver. This violated the fundamental right to be present at sentencing. This was a constitutional right and a statutory right to be present. Judge McKeon violated the law by sentencing Defendant in absentia. See Affidavit Nos. 5-6. Judge McKeon acted in concert with the state prosecutor and also with Defendant's attorney in furtherance of conspiracy to incarcerate the Defendant, which is easily proven by the fact that Judge McKeon sentenced Defendant in absentia at a secret sentencing hearing and then failed to notify Defendant of the secret hearing. The conspiracy also made certain that Defendant's attorney did not mention the in absentia sentencing in the appeal.

The Montana Supreme Court held that:

"The right of the criminal defendant to be present in the courtroom has its source in the confrontation clause of the Eighth Amendment to the United States Constitution and Article II, Section 14, of the Montana Constitution, which states, in relevant part, "[i]n all criminal prosecutions

The accused shall have the right to appear and defend in person and by counsel. The purpose of the right of presence is to: (1) assure defendants the opportunity to observe, in most cases, all stages of the trial in order to prevent the loss of confidence in courts as instruments of justice which secret trials would engender, and (2) protect the integrity and reliability of courtroom procedures by guaranteeing the defendant the opportunity to aid in his defense. (Citing United States v. Gregorio (4th Cir., 1974) 497 F.2d 1253, 658-59, cert. denied (1974) 419 U.S. 1024) " State v. Lane, 288 Mont. 286, 294 (1988).

Here judge McKeon used his courtroom as an instrument of injustice and held a secret sentencing hearing in which Defendant was denied his constitutional and statutory rights of allocution and to speak in his behalf. Judge Mc Keon's courtroom has no integrity or reliability of courtroom procedures because he denied defendant the opportunity to aid in his defense." Id.

The Lane court gave special admonishment to the particular behavior of judge McKeon and forewarned all judges that:

"The imposition of punishment in a criminal case affects the most fundamental human rights: life and liberty. Sentencing should be conducted with the judge and defendant facing one another and not in secret." (Citing U. S. v. Villano (10th Cir. 1987) 816 F.2d 1448, 1452-53); Lane, 288 Mont. at 298, (Emphasis added)

Judge McKeon paid no heed to that warning and instead adhered to his fellow conspirator's demands and sentenced Defendant in secret." Id.

The Lane court defined the specific statutes that mandate a defendant's presence at sentencing:

"The following Montana statutes require the defendant's presence when his sentence is pronounced: 46-16-121;... 46-16-123...; 46-18-115...;. These statutes implement the Sixth Amendment and Article II, section 24, of the Montana Constitution, allowing the defendant to be present and giving him an opportunity to respond before the trial court imposes its sentence. A defendant's only opportunity to respond is at the sentencing hearing before the sentence is orally pronounced." Lane, 286 Mont. at 294-95.

Judge McKeon violated these laws and he should be disbarred from the bench. Defendant should have been present at the time judge McKeon found him guilty of the probation violation of allegedly failing to complete SOP so that he could have spoken on his behalf because his attorney never did speak on defendant's behalf. Defendant had an absolute fundamental right to be present at his sentencing but judge McKeon denied him that right.

The Ninth Circuit has also issued strict orders on this issue and held that: "(2) unconstitutional sentencing in absentia was structural error. Reversed and Remanded." Hays v. Arave, 977 F.2d 475 (9th Cir. 1992). (Sentencing state prisoner in absentia, in violation of federal constitutional right to be present at sentencing, was structural error which required automatic reversal since right to be present and participate in sentencing was critical and impact of error on outcome of proceeding could not be accurately determined on appeal.). Hays, 977 F.2d at 479-80. Therefore, the state cannot argue harmless error at this time, even though the concerted actions of defendant's attorney failed to

raise this issue on the appeal. "Every action that transpires in a sentencing proceeding can be fundamentally altered by the defendant's absence, and the entire process can thereby be affected." Hays, 977 F.2d at 480. The final reason why unconstitutional in absentia sentencing cannot be affirmed on the basis of harmless error is because the right to be present at one's sentencing proceeding is a 'fundamental' one, (citing Arizona v. Fulminate, 111 S.Ct. 1246, at 1265 (1991)), that 'transcend the criminal process.' Hays, 977 F.2d at 481. "A defendant who has been sentenced in absentia without his consent is deprived of almost all of his rights at that crucial hearing. A sentence imposed at such a proceeding is abhorrent to democratic conceptions of justice. It shows a lack of fundamental respect for the dignity of a man to sentence him in absentia." Hays, 977 F.2d at 481.

Judge McKeon's unconstitutional in absentia sentencing of Defendant was a violation of his "fundamental" rights that "transcend the criminal process". Id. Judge McKeon's actions were "abhorrent to democratic conceptions of justice" and showed "a lack of fundamental respect for the dignity of [Defendant]", Id., to sentence him in absentia. There can be no argument but that Judge McKeon is biased and prejudiced against Defendant and he must be disqualified.

In short, Judge McKeon's actions and omissions violated Defendant's "fundamental requirements of due process." "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time in a meaningful manner.'" Smith v. Board of Horse Racing, 288 Mont. 249, para. 11. This issue is not "based solely on rulings in this case" as stated in Section 3-1-805 MCA, it is based on the failures of Judge McKeon and it calls for his disqualification because of the bias and prejudice against Defendant.

(3) Increase of punishment for exercising right to appeal.

Judge McKeon readily displayed vindictiveness by penalizing Defendant

for exercising the right to appeal the decision of the September 27, 2000 revocation hearing. Following that hearing the District Court sentenced Defendant to 15 years with 8 years suspended. (See D.C. Docs. 175-179). After appealing that judgment and being granted a new revocation hearing, Judge McKeon sentenced Defendant to 15 years with no time suspended. Defendant was penalized by Judge McKeon and sentenced to an additional 8 years in prison solely because he exercised his constitutional rights to appeal. There were no instances of identifiable conduct on the part of Defendant occurring after the time of the original sentencing proceeding to warrant the increase of sentence. It is a due process violation under both the Federal and State Constitutions to punish a person for exercising a protected statutory or constitutional right. See State v. Hall, 317 Mont. para. 12 (2003), citing State v. Baldwin (1981) 192 Mont. 521.

"Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." Citing North Carolina v. Pearce, 395 U.S. 711, 725 (1969); State v. Hubbel, 304 Mont. 184, 190 (2000).

Judge McKeon's re-sentencing did not demonstrate any new unknown or damaging information. Therefore, the objective evidence in this case supports the inherent risk that the additional 8 years in prison sentence was vindictive. See affidavit, No. 7.

(4). Failed to issue a new bench warrant after original revocation hearing was declared void.

Judge McKeon failed to issue a new bench warrant after the original revocation hearing held on September 27, 2000 was declared void because Defendant

were not given a preliminary hearing. See Affidavit, No. 18. The Montana Supreme Court gave specific orders that the State must follow after a defendant's first revocation hearing has been found void for lack of jurisdiction and held that: "To proceed anew, the State and the District Court must follow the procedures outlined in the newly amended statute which became effective May 1, 2001." State v. Hoebel, 306 Mont 83, 91 (2001). The procedure mandated by Section 46-23-1012, MCA (2001) required that the State "will proceed in accordance with Section 46-23-1012, MCA(2001) by serving on Petitioner a new bench warrant for Petitioner's arrest." Mitchell v. State, Mt. Sup. Ct. Order No. 01-760 (4-27-01) at 1. The Montana Supreme Court further set forth explicit orders that: "Petitioner is to be released from custody...within 48 hours, unless the new bench warrant has been served by that time." Mitchell, Id. Judge Mc Keon failed to issue a new bench warrant and he also refused to release Defendant because of that failure. See Affidavit, No. 20 and 21. It was very vindictive on the part of Judge Mc Keon to refuse to follow the law on this matter of which proves bias and prejudice. This due process violation calls for disqualification of Judge Mc Keon.

⑤. Failed to issue a decision on the pro se motion to withdraw guilty plea and also failed to consider Defendant's actual innocence presented in that motion when deciding issues presented in revocation proceedings.

Because of a conflict of interest with his court-appointed counsel, Defendant filed a pro se Motion to Withdraw Guilty Plea-Habeas Corpus on March 29, 2001 in this Court. Judge Mc Keon has never addressed the merits of that Motion, nor did he acknowledge Defendant's claims of actual innocence presented in that Motion when he decided the revocation proceedings. Defendant further argued his actual innocence at the revocation hearing, see Affidavit, No. 22. Judge Mc Keon failed to consider the relevant evidence of my actual innocence

after it was properly presented and made part of the court record. See Affidavit, Nos. 22-23. There is no mention in any of Judge McKeon's opinions that show he considered the evidence of my actual innocence. See Affidavit, No. 24. The failure of Judge McKeon to acknowledge the facts of my actual innocence in his findings is "a defect in the fact-finding process." "Failure to consider key aspects of the record is a defect in the fact-finding process." Citing Miller-el v. Cockrell, 537 U.S. 322, 346 (2003); Taylor v. Maddox, 366 F.3d 992, 1008 (9th Cir., 2004).

Judge McKeon's inordinate delay in failing to issue an opinion on the pro se Motion to Withdraw Guilty Plea is a violation of due process and has been for the past 5 years. "Delay in granting a required hearing can constitute a denial of due process requiring that an appropriate remedy be fashioned." Quoting Sage v. Gamble, 279 Mont. 459, 464-65 (1996); Ellis v. Mahoney, Mt. Sys. Ct. Order No. 04-659 (Nov. 24 2004) at 2.

The failure to issue an opinion or to address the merits of Defendant's pro se motion was a due process violation. The delay of five years is a due process violation and the failure to consider key aspects of the record is a further due process violation. The cumulative of these failures call for the disqualification of Judge McKeon. Defendant had a due process right to a decision and to an opinion on his pro se motion regardless of whether it was procedurally filed correctly or not so that he could rightfully appeal. See Affidavit, Nos. 16-17.

(6). Allowing and condoning fraud and perjury during proceedings.

Judge McKeon allowed and condoned a fraud of false and perjured testimony by Chris Quigley, Sex Offender Counselor of Montana State Prison at the November 20, 2001 revocation hearing concerning a false, fraudulent, and altered Sexual Offender Risk Assessment of Defendant. Mr. Quigley altered the assessment from a Tier II evaluation to a Tier III evaluation in order

To prevent Defendant from being released to his suspended sentence, Mr. Rigley further testified to the authority of the document at the hearing, which was perjury. See Affidavit, No. 9. Judge McKeon used the fraudulent and altered Sexual Offender Risk Assessment of a Tier III evaluation to violate Defendants suspended sentence after being duly notified the document was false and fraudulent. See Affidavit, No. 10. The Sexual Offender Risk Assessment is entirely false and was not prepared using Defendants clinical history. See Affidavit, No. 11. Using the Sexual Offender Risk Assessment with the correct information Defendant would be evaluated as a Tier I risk level, the lowest possible evaluation. See Affidavit, No. 12. Judge McKeon could not have violated my suspended sentence if Defendant would have correctly been evaluated as a Tier I risk level because Marla North, of Lewistown, Montana, Sexual Offender Treatment Specialist would have accepted Defendant into her treatment program. See Affidavit, No. 13. Judge McKeon stated in the Order to revoke Defendants suspended sentence that he was revoking the suspended sentence because of Defendants Tier III evaluation which was after being duly informed the document was false and fraudulent. See Affidavit, No. 25. Judge McKeon further refused to allow Marla North re-evaluate Defendant to see if he could be placed in her program. See Affidavit, No. 14.

In summary, Defendants suspended sentence was violated and he was sent to prison by concerted actions and omissions through a cleverly planned and executed scheme by Judge McKeon, the Treasure County Attorney, and Defendants attorney, that committed the above acts of fraud in the Montana Sixteenth Judicial District Court in order to prevent Defendant from gaining his rightful liberty. There was no justice in Judge McKeons court, he sold out justice to the highest bidder - the State of Montana. To participate in the

fraud and perjury that has been shown here leaves the indisputed fact that judge McKeon and his courtrooms are a mockery of justice.

Defendant produced evidence at the revocation hearing proving that the sexual offender risk assessment was false and altered. see Affidavit, No. 26. But judge McKeon failed to have the document corrected, he failed to address the falseness in his order of revocation, and he used the false Tier III risk level to violate Defendant's probation knowing of the false risk level. This is fraud, committed by judge McKeon, acting as an officer of the court, this proves his court is a mockery of justice and there can be no doubt he is biased and prejudiced against Defendant. The United States Supreme Court ordered that "justice must satisfy the appearance of justice", Liljeberg, 486 U.S. at 864. But, in this case, judge McKeon allowed and condoned the fraud committed in his court and used the fraud to violate Defendant's liberty, and he did it all knowingly. Many years ago the United States Supreme Court addressed a case of a fraud on the court and stated that:

"[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society....

The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238; 246 (1944).

But here, completely contrary to the above admonishments from the United States Supreme Court, after judge McKeon was advised of the fraud he failed to correct the false assessment, he never reprimanded the witnesses committing the fraud in his court, and he then participated in the fraud by using the fraudulent Tier III risk level to violate Defendant's Liberty.

The Risk Assessment shows that Defendant was on probation at the time of the alleged criminal acts and that he was given 2 points for this factor. See Affidavit, No. 27. At the revocation hearing judge McKeon was duly informed that Defendant was not on probation at the time of the alleged acts. See Affidavit, Nos. 28. Judge McKeon was further advised that when those 2 points are subtracted from the risk score, Defendant would score a Tier II risk level. See Affidavit, No. 29. But judge McKeon used the Tier III risk level to violate Defendant's suspended sentence after being informed that it was false. See Affidavit Nos. 9 and 10. In short, judge McKeon allowed Mr. Quigley's alteration of the risk assessment after it was prepared by a panel of M&P counselors, but he refused to allow it to be changed to show that Defendant was not on probation. This proves bias and prejudice by judge McKeon against Defendant.

Trials in courts of law are supposed to be a search for the truth, but judge McKeon's court would not accept or use the truth, his court is a court of untruth, it is a mockery of American justice.

⑦. The failure to accept the truth of Defendant's actual innocence.

Although this issue is duplicative of Issue No. 5, the facts of judge McKeon's failure to accept the truth of Defendant's actual innocence should be further clarified and fortified hereto prove judge McKeon's court is a court of untruth, as is proven by his own statements concerning Defendant's guilty plea and whether it was a voluntary and intelligent guilty plea.

Defendant was charged with several counts of sexual intercourse and convicted of one count of sexual intercourse. See Affidavit, No. 34, at the revocation hearing, Defendant presented sworn discovery responses from the purported victims that confirmed there was no sexual intercourse perpetrated by Defendant against them. See Affidavit, No. 30. John Yoder, the purported victim's attorney, testified at the revocation hearing that the above discovery responses confirmed that there was no sexual intercourse perpetrated by Defendant against the purported victims (transcript, pp. 297-298). See Affidavit, No. 31. John Yoder further testified at the revocation hearing that the discovery responses were verified by the purported victims' guardian ad litem and that both purported victims denied ever having been subjected to intercourse, either anally, orally, or vaginally at the hands of Defendant (transcript, pp. 299-301). See Affidavit, No. 32. The discovery responses swear that: "Plaintiff... never made allegations of 'sexual intercourse.' See Affidavit, No. 33. After hearing the above testimony and after being provided the discovery responses, Judge McKeon held that Defendant "voluntarily pled guilty," see Affidavit, No. 35. This statement made by Judge McKeon, after being duly notified that the criminal charges were false and filed without probable cause and after hearing the uncontested testimony swearing the purported victims never alleged acts of sexual intercourse, that Defendant "voluntarily pled guilty" is all the proof needed to prove bias and prejudice against Defendant. Judge McKeon refuses to accept the truth, his court is a court of untruth, it is a mockery of justice.

Judge McKeon's refusal to accept the truth is a violation of his oath of affirmation to uphold the United States Constitution and the laws of the land. He should be charged with a dereliction of duty to uphold the law.

The laws of the United States Constitution mandates that "the judges in every state shall be bound thereby" but apparently Judge McKeon has never read the Constitution which mandates that:

"This Constitution and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby..." (Emphasis added).

Article VI, United States Constitution.

The "laws of the United States" state that:

("just as 'Conviction upon a charge not made would be a sheer denial of due process; so is it a violation of due process to convict and punish a man without evidence of his guilt.'")

Quoting Thompson v. City of Louisville, 362 U.S. 199, 206 (1960); Burnsworth v. Henderson, 179 F.3d 771, 774 (9th Cir. 1999).

And the United States Supreme Court acknowledges that:

"[a] plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.'" Citing Bousley v. United States (1998) 523 U.S. 614, 618; State v. Lone Elk, 326 Mont. 214, para. 13, (2005).

It is consequently illogical for Judge McKeon to conclude that Defendant "voluntarily pled guilty" to false charges, charges that were personally fabricated and perjured by the Treasure County Attorney while acting as an officer of the court.

The only logical conclusion to Judge McKeon's conclusion is that he is extremely biased and prejudiced against Defendant.

⑧. Refusal to lower bond.

Judge McKeon refused to grant Defendant a reasonable bond in this matter which must be considered to be an abuse of discretion and a demonstration of bias and prejudice against Defendant. Defendant's pre trial and after conviction bond until sentencing was \$30,000.00. See Affidavit, No. 37. Judge McKeon refused to lower it from the \$100,000.00 set for the probation revocation proceedings. See Affidavit, No. 38. After serving the 15 year prison sentence; after delaying his decision over twice the required time period of due process; after denying Defendant the right to be present at sentencing; after punishing Defendant for exercising his constitutional right to appeal; after failing to issue the required new bench warrant and refusing to release Defendant as required by law; after failing to issue a decision on Defendant's motion to withdraw guilty plea which presented the issue of his actual innocence; and after allowing and condoning fraud and perjury by State witnesses at the revocation hearing; after refusing to accept evidence of Defendant's actual innocence that was uncontested at the revocation hearing; Judge McKeon's refusal to lower the bond after being duly informed of Defendant's indigency is certainly proof of bias and prejudice against Defendant. See Affidavit, No. 39 for proof of knowledge of indigency. There is extreme prejudice shown here because Judge McKeon was duly informed that the criminal charges were false and that the Tier III evaluation was false. The testimony proving the false charges and the false Tier III evaluation was uncontested by the State, but Judge McKeon still refused to lower the bond. He is biased and prejudiced and he must be disqualifed from this cause and he should be removed from the bench.

The Montana Supreme Court has found that the lower courts engage in wholly inappropriate exercise of judicial power when they set bail in an amount that the court knows a defendant cannot afford to pay. See Billings v Layzel, 242 Mont. 145 (1990). "Excessive bail shall not be required," Montana Constitution, Article II, Section 22. Here, Judge McKeon knew the Tier III risk level evaluation was false and he also knew the criminal charges were false and had been filed without probable cause and then he found Defendant was indigent, but yet he refused to lower the excessive bond amount. There is something wrong with this picture, and that wrong is a biased and prejudiced judge McKeon.

Conclusion

The foregoing facts show that numerous issues which need to be raised on post conviction contain constitutional failures, omissions and errors on the part of Judge McKeon. Many of the issues, such as Defendant's actual innocence mandate an impartial judge to prevent a further miscarriage of justice in this cause such as the sham and farce that Judge McKeon participated in during the revocation proceedings. Judge McKeon's *in absentia* sentencing was abhorrent to the democratic conceptions of justice which makes it plain to see that his further presiding here would be a continued travesty of justice. As the Ninth Circuit puts it, Judge McKeon has showed "a lack of fundamental respect for the dignity of" Defendant previously, therefore he is not impartial, he is, in fact, biased and prejudiced against Defendant and he must be disqualified from this cause. Defendant moves for disqualification of Judge John C. McKeon for cause.

Dated, July 10, 2006

Thomas Van Haele
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P O Box 916
Shelby, MT 59474

Certificate of Service

I hereby certify that I served a true and correct copy of the foregoing document by placing same in the US Mail service this 14 day of July, 2006, or by hand delivering to the Treasure County Courthouse addressed to:

Treasure County Attorney's Office
Treasure County Courthouse
Hysham, MT 59038

Clerk of Court
Montana Sixteenth Judicial District Court
Treasure County Courthouse
Hysham, MT 59038

Karen Y Van Naele